UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

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SEEMA SHARMA, JAVED MUGHAL, SHAIKH HAQ, GUL R. TARIQ, ISHRAT SULTANA KHAN and INDIRABEN PATEL,

Plaintiffs,

-against-

AIRPORT MANAGEMENT SERVICES, LLC d/b/a HUDSON NEWS and HUDSON GROUP (HG) RETAIL, LLC,

Defendants.

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No. 16-cv-9109 (LAP)(GWG)

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COUNTS IV AND V OF PLAINTIFFS' AMENDED COMPLAINT

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Defendants respectfully submit this Reply Memorandum of Law in support of their Motion to Dismiss Counts IV and V of Plaintiffs' Amended Complaint.

PRELIMINARY STATEMENT

Defendants seek to dismiss Counts IV and V of Plaintiffs' Amended Complaint, in which Plaintiffs allege that Defendants "pre-emptively" or "anticipatorily" retaliated against them under the Fair Labor Standards Act and the New York Labor Law. Plaintiffs claim that Defendants terminated Plaintiffs' employment before they could, at some unknown time in the future, potentially complain about purported wage and hour violations.

Defendants' application is straightforward: precedent is unanimous in holding that a plaintiff cannot state a claim for retaliation without demonstrating that he or she engaged in a protected activity—the first element of a retaliation claim. Tellingly, Plaintiffs spend 25 pages[1] arguing in support of their retaliation claims but do not cite a ***single*** case in which a claim was maintained under an "anticipatory" or "pre-emptive" retaliation theory under the FLSA or NYLL. This is because no such claim exists as a matter of law: when making employment decisions, employers are not held to a standard of speculative clairvoyance about potential complaints that an employee could decide to make at some future point in time.

Plaintiffs never made any internal or external complaints of purported FLSA or NYLL violations; did not engage in any protected activities; and do not allege that they ever did so. The retaliation claims should therefore be dismissed with prejudice.

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[1] Plaintiffs have exceeded the Court's page limit for opposition papers by 5 pages. *See* Individual Practices of Chief Judge Loretta A. Preska.

ARGUMENT

I. Plaintiffs Fail to Provide Any Legal Justification for Their Claims, Because None Exists.

To state a claim of retaliation under the FLSA, an employee ***first*** must have "***filed*** a[] complaint or ***instituted* or *caused to be instituted*** a[] proceeding under or related to" the FLSA." 29 U.S.C. § 215(a)(3) (emphasis added). The NYLL likewise requires that a plaintiff must "allege that he ***made a complaint*** about his or her employer's alleged violation of the [NYLL]," and was "subject to an adverse employment action as a result." *Week Pubs., Inc. v. Hernandez*, No. 654007/2015, 2016 WL 8379309, at *3 (Sup. Ct. N.Y. Cnty. Dec. 20, 2016) (emphasis added). Consistent with this, as set forth in Defendants' initial Memorandum in support of this Motion, a plaintiff's engagement in a "protected activity" is an essential prerequisite to a retaliation claim under both the NYLL and the FLSA. (*See* ECF No. 13 ["Memo."], § IV.A.ii.)

Despite this overwhelming precedent, Plaintiffs insist that they are entitled to assert "anticipatory" or "preemptive" retaliation claims, *i.e.*, that Defendants may be held liable for terminating Plaintiffs because, hypothetically, in the future, Plaintiffs might have complained of purported wage and hour violations. Unsurprisingly, Plaintiffs' Opposition fails to cite a single case standing for this proposition, and for good reason: no court has ever recognized this as a viable cause of action.

Plaintiffs marshal a handful of citations that supposedly support their novel retaliation theory,[2] but not a single one stands for the proposition that a cause of action for "anticipatory" or "pre-emptive" retaliation exists. To the contrary, these cases uniformly hold that protected activity is, in fact, required to state a viable retaliation claim. For instance, Plaintiffs cite *Ochei v. The Mary Manning Walsh Nursing Home Co., Inc.*, but this case unequivocally affirms

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[2] Plaintiffs cited to the same cases in their Complaint, which Defendants addressed in their initial briefing of this Motion. (*See* Memo at 5-10 and Opp. at fn2.)

Defendants' position, holding: "[s]ince plaintiff ***did not file a [] complaint about her alleged lack of overtime pay until after she was fired, she could not possibly have been fired for filing the [] complaint***." 2011 WL 744738, at *6 (S.D.N.Y. Mar. 1, 2011) (emphasis added). Specifically, the plaintiff in *Ochei* "repeatedly" requested overtime pay approximately six months before her termination, but did not file a complaint with the Department of Labor until a month ***after*** her termination. *Id*. The Court rejected her claims, expressly noting that it found ***no*** case law to support a claim of "anticipatory retaliatory termination." *Id.*

Plaintiffs' reliance on *Munguia v. Bhuiyan* is similarly misplaced, because in that case the employer "***knew*** that [the plaintiff] was requesting tax information ***in order to prove*** that he was consistently paid below minimum wage and did not receive overtime . . . ." *Munguia v. Bhuiyan*, No. 2011-cv-3581, 2012 WL 526541, at *3 (E.D.N.Y. Feb. 16, 2012). Here, there are ***no*** allegations that Plaintiffs had taken any steps to challenge purported wage and hour violations or that Defendants were aware of any such challenge (or even that Plaintiffs themselves were aware of any purported violations).

Beyond this, Plaintiffs seriously and self-servingly misstate much of their authority in an effort to preserve their unsupportable cause of action. For instance, Plaintiffs contend *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997), stands for the proposition that "Title VII's anti-retaliation provision should be expansively construed to prevent '*a perverse incentive for employers to fire employees who might bring Title VII claims*,'" further noting that *Robinson* cites to an "FLSA retaliation case," *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), in support of this proposition. (Opp. at 6 [emphasis in original].) But *Robinson* merely interprets Title VII's definition of "employer" to include a certain category of worker within its ambit; it says ***nothing*** about the scope of anti-retaliation protections afforded to employees, or the viability of preemptive retaliation claims. *Robinson*, 519 U.S. at 346. Similarly, *Mitchell* is entirely off-point, because it concerns whether an employee may waive certain irrelevant FLSA statutory rights. *Mitchell*, 361 U.S. at 293.[3]

Since Plaintiffs have failed to proffer a single case that supports their position, Defendants have scoured the case law and found absolutely no support for the existence of a claim for anticipatory or pre-emptive retaliation under New York law. The sole employment-related results referencing either "anticipatory" or "pre-emptive" retaliation or termination are *Ochei* (discussed above) and *Kemp v. Metro-North R.R.*, in which the Court rejected the plaintiff's "anticipatory retaliation" claim, holding that a plaintiff "cannot claim the transfer was retaliation for her Charge, because the transfer was determined and being implemented ***before*** she filed the Charge." No. 04-cv-9926, 2007 WL 1741256, at *18 (S.D.N.Y. June 14, 2007).

Plaintiffs ask this Court to adopt a wholly new cause of action, unsupported by any precedent or statutory authority. The very essence of a "retaliation" claim is that an employer is "retaliating" against an employee for having engaged in a protected activity; where the employee has not done so—and where, as here, there is no impending threat that the employee might do so—there is nothing to "retaliate" against. Indeed, if the Court were to accept Plaintiffs' paradigm, this would mean that any time an employee at ***any of the employer's locations*** institutes a lawsuit or files a charge, all other employees would be immediately imbued with "retaliation" claims should they ever be terminated on any basis. This is absurd, unworkable and contrary to law.[4]

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[3] Plaintiffs similarly cite *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 879 (2d Cir. 1988) – which examines whether an employer may terminate employees for refusing to waive statutory rights under the FLSA – because that Court noted in a parenthetical that *Brock v. Richardson*, 812 F.2d 121, 125 (3d Cir. 1987), permitted retaliation claims where the employer "mistakenly believed" that the employee had engaged in a protected act. This is another off-point case: Plaintiffs do not allege – because they cannot – that Defendants "mistakenly believed" that Plaintiffs engaged in any protected activity. Rather, the issue here is whether an employee can state a claim for retaliation where she never engaged in a protected act, never indicated that she intended to engage in a protected act, and never took any steps to engage in a protected act, and where there is no allegation that the employer mistakenly believed that she had engaged in any protected activity. Again, no authority stands for this broad-sweeping proposition.

II. Plaintiffs' Fail to Assert Facts to Support a Retaliation Claim

Recognizing the legal deficiency of their claims, Plaintiffs attempt to muddy their "factual" allegations to create the veneer of a factual issue. But despite seven pages of "factual" analysis (Opp., pp. 8-14), Plaintiffs fail to allege ***anything*** to support that at the time of their termination: (i) they engaged in any protective activity; (ii) they intended to engage in any protected activity; (iii) they were aware of any facts that might form the basis of any protected activity; or (iv) Defendants had any knowledge or even any reason to believe that any of the Plaintiffs had any inkling to engage in any protected activity.[5] In short, they do not allege the critical prerequisites to their claims.

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[4] The balance of cases cited by Plaintiffs involves claims not at issue here, such as Title VII claims. Not one of these cases holds that an employee may assert a retaliation claim where he has not engaged in or threatened to engage in a protected activity, or where the employer did not reasonably believe that the employee had engaged in such activity. Simply stated, none of these cases demand that an employer foresee what employees may do in the future. *See, e.g., Robinson*, 519 U.S. at 346 (1997) (failing to address the concept of anticipatory retaliation in any way whatsoever, and merely examining the scope of the definition of the term "employer" under Title VII); *Rodriguez v. C & S Wholesale Grocers, Inc.*, 108 A.D.3d 848, 849 (N.Y. 3d Dep't 2013) (in state law worker's compensation claim, finding employer's policy that dissuaded probationary employees from reporting injuries was improper); *Sauers v. Salt Lake Cty.*, 1 F.3d 1122, 1128 (10th Cir. 1993) (employer believed discrimination complaint was imminent); *Adams v. Persona, Inc.*, 124 F. Supp. 3d 973, 982 (D.S.D. 2015) (prohibiting employer from terminating employee in ADA case where employer ***knew*** that the employee had a disability requiring a reasonable accommodation).

[5] To the extent that Plaintiffs rely on the letter that Plaintiff Patel's attorney sent to Defendants in October 2015 after her initial termination (for poor performance)—roughly a year before the termination at issue here—such a delay is far too long to support a causal connection between the letter and the termination. *See Beachum v. AWISCO N.Y.*, 785 F. Supp. 2d 84, 98 (S.D.N.Y. 2011), *aff'd.*, 459 F. App'x 58 (2d Cir. 2012) (courts have "have consistently held that the passage of two to three months between the protected activity and the adverse employment action does not allow for an inference of causation"). Moreover, *Ochei* explains that since there

Instead, they assert that the *Nabi* litigation somehow creates a timeline indicative of retaliation. (Opp., at pp. 8-14.) This makes no sense: Plaintiffs were not involved in the *Nabi* litigation; were not class or collective members in the litigation; and had no role in the litigation whatsoever (and other than Plaintiff Sharma, it is unclear whether any of the Plaintiffs were even aware of this litigation). Indeed, Plaintiffs' contention is internally inconsistent: they claim that they were terminated because they were Operations Managers who could have asserted claims similar to those alleged in *Nabi*, but they do not claim that ***all*** Operations Managers were terminated (they were not), which would be the only logical result if, in fact, Hudson were engaged in some broad scheme to preemptively terminate Operations Managers in order to avoid potential, speculative complaints (which, of course, it was not).

III. The NYLL Does Not Recognize Claims of Retaliation Premised on Complaints Regarding Purported Unpaid Overtime

As set forth in Defendants' initial Memorandum, Section 215 of the NYLL—which governs retaliation claims—does not permit claims based on retaliation for the failure to pay overtime wages. (*See* Memo., § IV.A.i.) Plaintiffs contend that changes in law in 2011 hold that this is no longer the case. Plaintiffs are wrong on the law. Indeed, Plaintiffs ignored Defendants' citation to a 2013 decision decided two years after the change in law that Plaintiffs rely upon. Further, Plaintiffs' sole support for their argument is a single unpublished case that has never been cited for this proposition by another court, does not rely on any other case law supporting this proposition, relies on an ambiguously applicable change in statutory law, and is not binding on this Court.

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was no "proverbial race to the courthouse" given this lengthy delay, there could be no basis for suggesting that Patel was terminated to prevent any imminent complaint (not that Defendants had—or Plaintiffs allege—any basis to believe that such could be imminent). *Ochei*, 2011 WL 744738, at *6. Of course, even if somehow relevant, this could relate only to Ms. Patel, and not any other Plaintiff.

CONCLUSION

For the reasons set forth above, and as set forth in the Memorandum, Defendants respectfully request that the Court grant Defendants' Motion to Dismiss Counts IV and V and dismiss these claims in their entirety, with prejudice.

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